

# THE ENVIRONMENTAL LAW DIVISION BULLETIN



May 1996

Volume 3, Number 8

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

---

## ***Clean Air Act and Explosives - LTC Olmscheid***

EPA has agreed to conduct notice and comment rulemaking to delete explosives from the list of regulated substances under the Clean Air Act Section 112(r) as part of a settlement agreement. American Petroleum Institute v. EPA, No. 94-1276 (D.C. Cir. Mar. 29, 1994). If explosives are not deleted, Section 112(r) may require military installations to handle and store explosives in a manner that is substantially different than the current practices that were developed by the DOD Explosives Safety Board (DESB). The proposed rulemaking is expected to occur within the next several months.

## ***Clean Air Act and Conformity - LTC Olmscheid***

The United States District Court for the District of Columbia upheld EPA's conformity regulations that implement Section 176(c) of the Clean Air Act. Environmental Defense Fund v. EPA, No. 94-1044, 1996 U.S. App. LEXIS 8666 (D.C. Cir. Apr. 19, 1996). While conformity provisions are burdensome, this decision is important to federal agencies since plaintiffs were attempting to vacate EPA regulations that limited the number of federal actions requiring conformity determinations. Installations should continue to follow previous conformity guidance put out by HQDA and their MACOM.

## ***Historic Preservation: A BRAC Installation Case Study - MAJ Tannenbaum***

Fort Ritchie, MD, is a Base Realignment and Closure (BRAC) installation scheduled for closure by 1998. It was built in 1920; portions of the installation appear to be eligible for inclusion in the National Register of Historic Places as an historic district. Currently the Army and the Maryland State Historic Preservation Officer are reviewing the historical documentation on Fort Ritchie in order to establish its significance. In the event that the Fort is determined to be eligible, the Army will have to comply with the requirements of Section 106 of the National Historic Preservation Act (NHPA) of 1966, 16 U.S.C. §470f. Section 106 requires that all Federal agencies "take into account" the effect of their undertakings on historic properties and "afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment." The Advisory Council has published regulations to implement Section 106. Protection of Historic and Cultural Properties, 36 C.F.R. Part 800 (1995).

If the Army determines that buildings, structures, sites, or districts on the installation qualify for inclusion on the National Register, then the Army must treat those properties as eligible for inclusion on the National Register. Having concluded that properties are National Register eligible, the Army has consequent affirmative consultation duties under Section 106 and preservation duties under Section 110 of the NHPA. In the Fort Ritchie example, if Fort Ritchie determines that properties on the installation are National Register eligible, then Fort Ritchie must enter

into consultation with the Maryland State Historic Preservation Officer, the ACHP, and appropriate interested parties to identify alternatives to avoid or mitigate the adverse effects of transferring the property out of Federal ownership and the subsequent private development of the site that will undoubtedly occur. The goal of the consultation should be to try to ensure that this development is sympathetic to the historic and architectural significance of Fort Ritchie. These measures should be codified in a Memorandum of Agreement with the above mentioned consulting parties, which will constitute the "comments" of the Advisory Council as required by Section 106.

ELD is currently working with the Office of the Secretary of the Army General Counsel (SAGC), the Army Environmental Center (AEC), and the ACHP to develop a prototype Memorandum of Agreement for BRAC situations that can be tailored for individual installations. This document should be available for use by BRAC installations in several weeks.

### ***Critical Habitat Determinations and NEPA - MAJ Ayres***

The United States Court of Appeals for the Tenth Circuit held recently that the Department of Interior (DOI) must comply with the National Environmental Policy Act (NEPA) before designating critical habitat for protected species under the Endangered Species Act (ESA). Catron County Board of Commissioners v. U.S. Fish and Wildlife Service, No. 94-2280 (10th Cir. 1996). The Tenth Circuit's opinion stands in direct conflict with a previous opinion of the Ninth Circuit that affirmed the Secretary of Interior's decision to designate over 11 million acres as critical habitat for the Spotted Owl while asserting that the Interior need not comply with NEPA. Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995).

In a related matter, the Catron County decision discussed, but did not rule upon, whether NEPA applies to the DOI's decisions to list species as threatened or endangered under Section 4 of the ESA. Determination of Endangered Species and Threatened Species, 16 U.S.C. § 1533 (1988). In 1981, the Sixth Circuit ruled that the Secretary of Interior need not comply with NEPA when listing species as endangered or threatened under the ESA. Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981). In 1983, the Council on Environmental Quality (CEQ) indicated approval of the position held by the Sixth Circuit when it assented to a letter issued by the Secretary of Interior commenting that the Secretary could cease preparing NEPA documents when listing species under the ESA. Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions under the Endangered Species Act, 48 Fed. Reg. 49,224 (1983) (to be codified at 50 C.F.R. pt. 17). The split between the Ninth and Tenth Circuits on the applicability of NEPA to critical habitat designations means that it is likely that the U.S. Supreme Court will be asked to review this issue.

### ***Candidate Species Listing Developments - MAJ Ayres***

Installations with resident candidate species should be aware of a series of new developments that could affect listing decisions by the DOI. The Congressional moratorium for listing species under the ESA has been extended through fiscal year 1996. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-06, 110 Stat. 186 (1996). In a matter connected with the moratorium, the Ninth Circuit recently ruled that the DOI cannot be forced to list species as threatened or endangered absent Congressional funding to do the job. Environmental Defense Center v. Babbitt, 73 F.3d 867 (9th Cir. 1995).

On 28 Feb 96, the Fish and Wildlife Service (FWS) promulgated an updated list of plants and animals that it regards as candidates for listing under ESA Section 4. Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed. Reg. 7596-613 (1996) (to be codified at 50 C.F.R. pt. 17).

17). On 11 Mar 96, the FWS adopted interim guidance for assigning priorities to conduct listing and delisting actions under ESA Section 4. Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9651-3 (1996). Taken together, these two FWS announcements may assist installations to appropriately manage their natural resources.<sup>1</sup>

### ***Native American Graves Protection and Repatriation Act Regulations Published - MAJ Ayres***

The DOI has promulgated regulations and procedures to develop a systematic process for determining the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated. Native American Graves Protection and Repatriation Regulations, 60 Fed. Reg. 62158-69 (1995) (to be codified at 43 C.F.R. pt 10). The regulations took effect on 3 January 1996. Promulgated pursuant to the authority of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001-3013, the regulations apply in relevant part to the identification and disposition of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony already under Federal control, or excavated intentionally or discovered inadvertently, on Federal land.

### ***Council on Environmental Quality Proposed Report on Guidance for Addressing Environmental Justice under the National Environmental Policy Act - MAJ Corbin***

On 15 April 1996, the Council on Environmental Quality (CEQ) issued draft guidance for addressing Environmental Justice (EJ) within the National Environmental Policy Act (NEPA) in accordance with Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The draft guidance provides the following general principles for considering EJ in specific phases of the NEPA process:

1. Scoping: Scoping should begin as soon as practicable after formulating a purpose and need for the proposed action. Installations should determine whether the area affected includes low-income or minority populations and seek input from these populations on the proposal. Installations should communicate the determination basis to the public as appropriate in later NEPA documents and NEPA process communications. Also, develop and ensure effective communication strategies in the Scoping process that include diverse public involvement.

2. Public Participation: CEQ's regulations require comprehensive public involvement throughout the NEPA process. Installations should use innovative or adaptive approaches to overcome linguistic, institutional, cultural, economic, historical, or other barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures.

3. Determining the Affected Environment: To determine whether a proposed action is likely to have disproportionately high and adverse effects on minority or low-income communities, installations should identify a geographic scale to obtain demographic information and ensure that

---

<sup>1</sup> DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES - LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995), states: "Species that are candidates for federal listing as threatened or endangered are not protected under the ESA. Because candidate species may be listed in the future, installations will consider them in making decisions that may affect them." Additionally, the FWS encourages the consideration of impacts of agency actions on candidate species when preparing environmental analysis documents under NEPA and generally will request such consideration during Section 7 consultation.

the geographic scale is coextensive with the potential impact area. Census data on CD-ROM and Landview II are available resources for this information.

4. Analysis: When a disproportionately high and adverse impact on a low-income or minority community is identified, installations should explicitly analyze how environmental effects are distributed in that and other communities. Where a potential EJ issue has been identified, the analysis in a EIS or EA should state clearly whether, in light of all of the facts and circumstances, a disproportionately high and adverse impact on minority communities or low income communities is likely to result from the proposed action and any alternatives.

5. Alternatives: Installations should encourage populations that may suffer a disproportionately high and adverse effect from a proposed agency action to help develop and comment on possible alternatives to the proposed agency action as early as possible in the process. When a disproportionately high and adverse impact on a low-income or minority community is identified from either the proposed action or alternatives, factor the distribution as well as the magnitude of the impacts when determining the environmentally preferable alternative. Consider the affected communities' views when weighing this factor.

6. Record of Decision (ROD): The ROD should explicitly discuss any disproportionately high and adverse impact on a low-income or minority population. The ROD should address whether the installation took all practicable means to avoid or minimize environmental and social harm. Where relevant, discuss how any disproportionately high and adverse impact on a low-income or minority population is addressed in monitoring and enforcement programs summarized in the ROD.

7. Mitigation: Throughout the public participation process installations should elicit the views of the affected communities on measures to mitigate a disproportionately high and adverse impact on a low-income or minority population, and should exhibit heightened deference to community views in developing and implementing mitigation strategies. Mitigation measures identified in an EIS or developed as part of a FONSI should accommodate the preferences of affected low-income or minority populations to the extent practicable. CEQ believes that successful consultation concerning the mitigation strategy may lead to greater community acceptance of agency actions that potentially have a disproportionately high and adverse effect on a low-income or minority population.

The draft guidance provides that it is intended only to improve the internal management of the Executive Branch and is not deemed to create an enforceable right against the United States. There may be challenges as to whether guidance of this nature actually creates an enforceable right against the United States. Nevertheless, the draft guidance is likely to undergo additional revisions before it is finalized. Revisions notwithstanding, the theme of CEQ's final guidance on EJ is bound to remain the same. That is, consider low-income and minority populations during the NEPA process and document EJ consideration at each relevant NEPA stage.

### ***Supreme Court Rules on State Immunity - LTC Lewis***

On 22 March 1996, the United States Supreme Court issued a ruling in Seminole Tribe of Florida v. Florida, et al., No. 94-12, 1996 U.S. LEXIS 2165, (Mar. 27, 1996). In a 5-4 decision, the court held that the 11th Amendment to the Constitution prevented Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause.

In making this ruling, the court overruled a 1988 decision whereby a plurality of the court had held that Congress has the power, via the Interstate Commerce Clause, to abrogate unilaterally the states' immunity from suit. Pennsylvania v. Union Gas Co., 491 U.S. 1, 105 L. Ed. 2d 1, 109

S. Ct. 2273 (1988). In Pennsylvania, the court held that CERCLA permits suit in Federal court against a state by a third party based on Congress' power under the Interstate Commerce Clause. Union Gas Company had sued Pennsylvania to recover costs of a clean up performed by the company. The Seminole decision means that states are again immune from suit by third parties, even if a state was the owner or operator of a site. The impact of this decision on other environmental laws remains to be seen, but the two dissenting opinions spoke of major adverse effects.

### ***New RCRA Enforcement Policy - CPT Anders***

EPA's Hazardous Waste Civil Enforcement Response Policy (ERP), published 15 March 1996, took effect on 15 April 1996. The intent of the ERP, which was sent to regional administrators and state agencies, is to establish flexible guidelines for a nationally consistent approach to enforcement of RCRA.

The ERP establishes two categories of violators: significant non-compliers (SNCs) and secondary violators (SVs). The former are "those facilities which have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements. . . ." *Id.* at 3. Secondary violators "are typically first time violators and/or violators which pose no actual threat or a low potential of threat of exposure to hazardous waste or constituents. A facility classified as a SV should not have a history of recalcitrant or non-compliant conduct." *Id.* at 4.

For SNCs, "formal" enforcement is appropriate under the ERP, which would "mandate compliance and initiate a civil, criminal or administrative process which results in an enforceable agreement or order." *Id.* at 5. The ERP recommends for SVs, at a minimum, an "informal enforcement response" that "consists of a recitation of the violations and a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable regulations, permits and statutes." *Id.* at 6. Facilities are given 90 days to correct violations or face reclassification as a SNC.

Installations are encouraged to read the new policy, and to use the definitions and standards therein when negotiating with EPA regarding open or threatened enforcement action.